

Regular Arbitration

In the Matter of the Arbitration)	Grievant: Derek Sturtevant
)	
between)	
)	
Federal Deposit Insurance Corporation)	Office: Federal Deposit Insurance
(hereinafter "the Employer"))	Corporation, San Francisco, CA
)	
and)	Case No: FMCS Case No. 040803-07349
)	
National Treasury Employees Union #273)	Arbitration Award:
(hereinafter "the Union"))	
)	
_____)	

Before: Arbitrator James G. Merrill

Appearances:

For the Employer Kathryn L. Ward, Esq., Kimberly A. Stock, Esq. Saul
Schwartz, Esq.

For the Union: Timothy J. Sheridan, Esq.

Place of Hearing: FDIC Office: 25 Jessie Street at Ecker Square, San Francisco,
CA 9514

Date of Hearing: February 22, 2005 (cancelled), July 26 & August 29, 2005

Award: The Employer did not violate the Collective Bargaining Agreement Article 18, Chapter 11 of the FDIC Circular 2420.1, or the FDIC/NTEU Memorandum of Understanding of March 13, 2003 when it failed to nominate the grievant for a Corporate Success Award. The grievance is denied.

Dated: December 19, 2005

James G. Merrill, Arbitrator
Livermore Valley, California

Background

Pursuant to the provisions of the Collective Bargaining Agreement between FDIC and NTEU the parties negotiated a Corporate Success Awards Program. The Program was created in December 2002 and was implemented in 2003. The program was designed to reward the top contributors to the success of the organization. It was to be implemented in a fair and equitable manner. Only the top 33/13 percent of the eligible bargaining unit employees within the region were to receive an award.

The grievant a grade 14 Review Examiner in the San Francisco Region was not nominated for a Corporate Success Award (CSA) in 2003. He grieved the fact he was not nominated for a CSA Award. The grievance was processed through Step 4 of the grievance procedure and it was not resolved. The grievance was appealed to arbitration and was scheduled to be heard on February 22. The Employer cancelled the hearing and the case was heard on July 26 and August 29, 2005. A transcript of the proceedings was distributed to each party. Post Hearing briefs were received by November 17, 2005.

Issue

The union stated that the issue is “did FDIC violate the provisions of Article 18 of the Nationwide Agreement between the NTEU and FDIC, the Compensation Agreement, the MOU regarding the CSA program and the FDIC Circular 12420.1 when the grievant was not nominated for a CSA award? If so what is the appropriate remedy?”

The Employer stated that the issue is “did FCIC abuse its discretion when it did not give a Corporate Success Award to grievant in 2004 based on his contributions for 2003? If so what is the appropriate remedy?”

The Arbitrator frames the issue to be “Did the Agency violate the Collective Bargaining Agreement Article 18, Chapter 11 of the FDIC Circular 2420.1, or the FDIC/NTEU Memorandum of Understanding of March 13, 2003 when it failed to nominate the grievant for a Corporate Success Award. If so what is the proper remedy?”

Pertinent Provisions of the Collective Bargaining Agreement between the Federal Deposit Insurance Corporation and National Treasury Employees Union.

Article 18 Rewards and Recognition

Section 1.

A. This Article shall be interpreted and applied in a manner consistent with the provisions of the most recent FDIC Rewards and Recognition Program Circular 2420.1 as well as with law, rule and regulation...

B. The Employer will grant incentive awards in a fair and objective manner in accordance with this Agreement and applicable rules and regulations.

C. Annual Pay Adjustment. A Corporate Success Award (CSA) will be established which provides that an additional 3.0 percent increase be made in basic pay for those employees recognized as top contributors... the percentage of bargaining unit employees to receive the CSA shall be no less than 33 1/3 percent These awards shall be made on an annual basis.

Pertinent Provisions of Circular 2420.1. FDIC Awards and Recognition Program.

Chapter 11. Corporate Success Awards

11.4 Criteria

A. Business Results: Consistently displays a high level of initiative, creativity, and innovation to produce results that reflect important contributions to the Corporation and/or its organizational components.

B. Competency: Demonstrates an exceptional degree of competency within his/her position, and is frequently relied upon by others for advice, assistance, and/or judgment that reflect important contributions to the Corporation and/or its organizational components.

C. Working Relationships: Builds extremely productive relationships with co-workers, other Divisions/Offices, or other public or private agencies based on mutual respect that reflect important contributions to the Corporation and/or its organizational components.

D. Learning and Development: Takes an active part in developing personal skills and competencies and applies newly acquired skills and competencies that reflect important contributions to the Corporation and/or its organizational components.

11.5. Procedures

B. Supervisors will nominate their top contributors by preparing the FDIC Form 2420/XX, Corporate Success Award Nomination...

C. Reviewing Officials, as designated in the Division/Office Delegation of Authority, will ensure the consistent application of Corporate Success award criteria and the fair and equitable treatment of employees... .

D. Each Division/Office Director (or designee) will serve as the approving official for all Corporate Success Awards within their Division or office...

Memorandum of Understanding Between the FDIC & NTEU

1. CSAs will be distributed to employees in a fair and equitable manner, and in accordance with the terms of this MOU and FDIC Circular 2420.1

Summary of the Union's Position

The following is a summary of the Union's presentation of its position based on a review of the transcripts, testimony, evidence, and the Union's post hearing brief.

The Union asserts that based on the criteria established for receiving a CSA award and the grievant's contribution to the organization he should have been nominated and

awarded a CSA for 2003. His contribution met the CSA Criteria of Business Results and Competency as well as the standard of being above and beyond what was expected of him. His contribution also consisted of activities not included in his position description. He volunteered for many activities and acted as back up to the case manager, worked with problem banks such as Bank of India, International City Bank and Rancho Bank. In comparing the grievant's contribution to recipients C's and S's, the grievant's contribution was greater than C's and S's contribution.

The Union stated that the Employer failed to implement the CSA program in a fair and equitable manner. They relied on Mr. Foster's written input for a performance evaluation when performance evaluations were not to be considered. In addition the Employer failed to seek input from two of the four managers who supervised the grievant in 2003 in considering whether to nominate him for a CSA.

Several of the managers who considered the grievant's contribution in 2003 had no knowledge of his contribution and one had limited knowledge. In at least one nomination, management relied on inappropriate justification in awarding a CSA. Testimony of two co workers of the grievant support that the grievant was entitled to a CSA based on their opinions as compared to CSA recipients C and S. In both instances, the Union outlined that while both CSA recipients C and S contributed enough to earn corporate success awards, neither met the standard to a greater extent than the grievant. The Union provided detailed opinions of the respective contributions of employees C, S and the grievant through testimony of the grievant, 2 co workers, documentary evidence and arguments as contained in its post hearing brief.

The Union asserts it has met the burden of proof that the Employer did not distribute the CSAs in a fair and equitable manner and that the grievant's contribution was greater than one other CSA recipient (S). The Union states that the grievant is entitled to be awarded a CSA, including back pay, interest and attorney fees.

Summary of the Employer's Position

The following is a summary of the Employer's presentation of its position based on a review of the transcripts, testimony, evidence, and the Employer's post hearing brief.

The Employer stated that the grievant was a grade 14 Case Manager within the FDIC's Division of Supervision and Consumer protection in the San Francisco Regional Office. None of the grievant's first level supervisors recommended that he be nominated as a top contributor in 2003 for a CSA. Charles Foster was the ARD in charge of supervising the grievant's work group for nine months in 2003. Prior to retiring Mr. Foster provided input regarding the employees he supervised including the grievant with respect to the CSA program. Mr. Foster ranked each employee in each of the CSA criteria and he did not rank the grievant as one of the top contributors in his work group. He ranked the grievant eleventh out of fourteen employees. The grievant was rated as eligible in 1 of the

4 criteria established for being nominated for a CSA. Those recommended were rated eligible in at least 3 of the 4 criteria. Mr. Foster's input was considered by the appropriate management who participated in the final selection of the Awardees.

The Employer stated that the process was followed and no procedural errors in applying the process or addressing the criteria were proven by the Union.

In addition, the Employer asserts that the Union has not provided evidence that the grievant's contribution was of greater significance to the organization compared to those who were nominated. The Employer's position is that the Union must show that management "abused its discretion" when it decided not to nominate the grievant for a CSA award. The Union has not shown such a violation of any provision of the Collective Bargaining Agreement, the MOU or the Circular despite the information it was provided. The CSA nominees in the San Francisco Region were selected in accordance with the established criteria and relative rankings determined by the managers and approved by the Regional Director.

The testimony of the grievant regarding his activities which the grievant participated in were not outside of his job responsibilities. Although he was a valued contributor, in the opinion of the managers charged with the responsibility to make those decisions, the other CSA nominees from his unit made a greater contribution.

The Employer had broad discretion in determining which employees were entitled to receive CSA for contributions in 2003. An Arbitrator should not set aside management's determination unless there is proof that management abused its discretion. The Union has not proved that the Employer abused its discretion in this case. Instead the record showed that the Employer properly considered the grievant's contribution as compared with other employees and determined that his contribution did not measure up to the other San Francisco Region's top contributors. The Employer states the evidence indicates that the Region distributed the CSA's in a fair and equitable manner and the grievant was properly denied a CSA. Therefore the grievance should be denied in its entirety.

Discussion

After reviewing the entire record of testimony, evidence, transcripts, post hearing briefs and the Arbitration Awards provided by each party to support their position, there are several key principles that in my opinion apply to this case.

Arbitrator Robert Nagle in FMCS Case 04-50040 stated in his Award that "*A basic question arises as to just what the role of an arbitrator should be in resolving such grievances. Certainly, an arbitrator must address instances where supervisors or managers are allege to have made selections based on criteria or considerations not specified in the FDIC Circular, or to have utilized procedures that were in violation of those agreed upon by the parties. And I assume that the requirement in the governing*

documents that the CSAs be distributed in a fair and equitable manner would serve as a basis for examining other instances where an individual claims to have been treated disadvantageously in comparison to similarly situated employees.”

“On the other hand, I very much doubt that the fair and equitable standard can appropriately provide an opening for routine arbitral second guessing of supervisory determinations that in all respects appear to have been made in good faith and on the basis of reasonably articulated considerations. Any notion that an arbitrator, possessing only the most general familiarity with the work of the FDIC, and little or no knowledge of the highly specialized functions performed with it various divisions, could emerge from a several hour hearing equipped to make well informed analysis and insightful judgments regarding the relative contributions of its various employees, would be rather unrealistic.”

Arbitrator C.Allen Pool in FMCS Case No. 04-07344 stated in his Award that “Another feature was the recognition by the Union that management has broad discretion in determining which employees will be nominated and selected to be a recipient of a CSA. This was a pivotal feature. So long as the Agency exercises that discretion in a fair and equitable manner an arbitrator will not substitute his/her own judgment for that of management. This is a widely accepted principle within the arbitral community.”

The Arbitrator agrees with the above principles set forth by Arbitrators Nagle and Pool and will apply them in deciding this case.

In the instant case, the grievant was considered a very competent and valued employee. There is no dispute that he was a solid performer. As a grade 14 which is considered a senior grade individual contributor, his responsibilities are broad and provide significant latitude and judgment.

There was insufficient evidence that the procedural process negotiated by the parties was not followed. In this case nominations were requested, supervisors evaluated the contributions of employees, rated them and made recommendations. There were meetings held with the appropriate managers to review the recommendations and a final decision was made and approved by the appropriate officials in accordance with the procedures established. The Union’s assertions that the grievant was supervised by a number of managers during 2003 and that they either did not participate in the evaluation of the grievant or had no knowledge of his contribution is not persuasive to conclude that he was not treated in a fair and equitable manner. The fact is that Mr. Foster supervised the grievant for 9 months of 2003 and was in a position to assess the grievant’s contribution to the organization based on the criteria of the CSA Program. The Union’s arguments that the grievant was not treated in a fair and equitable manner related to the process are not persuasive.

The substance of the evaluation and ranking process which is the heart of the case requires considerable review and this Arbitrator will apply the principles stated at the beginning of this Discussion.

Based on Exhibit A-4, there were 14 employees, 11 of which were bargaining unit employees in the grievant's unit. Of the 11 bargaining unit employees five (5) were rated as eligible to be nominated for a CSA. Three (3) were Case Managers and were nominated for a CSA based on Mr. Foster's ranking (A-4). Two of the three employees nominated were rated as "qualified" in each of the criteria used in the CSA program. The third employee nominated rated qualified in Business Result, Competency, and Working Relationship. Mr. Foster rated the grievant as "qualified" in "Competency" and not qualified in the other 3 criteria. He ranked the grievant 8th within the bargaining unit employees in the unit. I am persuaded that Mr. Foster's assessment was fair and equitable and was consistent with the procedures set forth in the CSA program.

As the Union chose to compare the grievant to employees C and S, the following represents the written nominations of CSA employees C and S (U-15 and d U-17). In addition, the grievant's recommended written input provided by Mr. Foster (U-5) which was the basis for not recommending the grievant for a CSA is provided for comparison.

Employee C written nomination for CSA

1. *"Employee C builds and maintains highly successful and productive relationships, routinely demonstrates outstanding communications skills and serves as a role model for other examiners. AS EIC at three exams, he was exceptionally effective in managing numerous conduct and performance issues, and he used excellent management techniques to improve team effectiveness. For instance, at the exam, he met with the team at the beginning and throughout of the examination to outline individual and team expectations (both work product quality and team conduct), obtain status reports, and provide the team with feedback. He also promoted a positive atmosphere by encouraging fun activities during break times. At the end of the exam, he met with the team to provide the group with positive and constructive feedback. In addition, he provided individualized feedback all staff members. He expressed appreciation by giving humorous awards to recognize unique contributions and also submitting formal award nominations. He used" similar techniques at his other EIC assignments. As the FO Training Coordinator, he provided training, motivation and mentoring to trainers, who at times became frustrated with the lack of progress in the training program. He has also been actively involved in" "providing direct training to assistant examiners, and he has been particularly effective in situations where developmental issues exist. He proved extra effort to truly assess the assistants' skill levels, prepared thoughtful and constructive feedback, and demonstrated excellent listening skills. He was"*

“instrumental in developing field office activities designed to enhance communications skills and build morale. His interactions with the bankers and DFI were also successful. During his assignment, he received complements from the bank president regarding his frequent and effective communications with management. Regarding the same exam, a DFI Assistant Deputy Commissioner commented that DFI was exceedingly impressed with his work, communications skills, and teamwork. His interactions with the historically difficult management team were highly successful, and his sensitivity addressed mismanagement’s concerns.”

Employee S written nomination for CSA

- 2 *“Employee S has helped to accomplish business results in the SF Region by handling a number of difficult cases and special projects while backing up tow other CMs who ere out of the office for extended periods. He worked on a de nova application which had an unacceptable proposed president/CEO. He researched the individual background and prepared a very detailed memorandum supporting a finding that the person was unacceptable. He also processed for another CM a de novo application which contained a number of issues. He has one LIDI-an S*L-TA\$7.4B. He revised a corrective program on a problem bank; drafted a corrective program on two 3-rated banks; and coordinated a section 8(e) investigation. He completed a merger for another CM. he capably supervised for another CM a difficult banker threatening to appeal his exam findings. He has handled a number of special projects. He researched a sweep account issue for another CM, prepared and analysis memo, and drafted a referral letter to the FRB_SF. He worked on completing a banker survey for the SF RRC. He gathered the responses, analyzed the data, prepared a paper, and made a presentation before the SF RRC. He handled this project managed his own caseload, while serving as Action ARD for two weeks. He is the RO contact for daylight overdrafts. He is a back-up for the RO Audit Committee. He is knowledgeable and experienced CM produces high quality work products and is highly respected team player.”*

Mr. Foster’s input on Derek Sturtevant’s contributions

- 3 *“Mr. Sturtevant has been a case manager in the San Francisco Region since November 1997. Derek very capably oversees a portfolio of 19 insured financial institutions having aggregate total assets of \$20 billion. This portfolio contains some challenging situations, including a Foreign Banking Organization operating under an Order to Cease and Desist related to BSA issues, and \$11 billion thrift which presents significant capital market issues, and several 3-rated shops of varying charter types. This has entailed handling number of formal and informal corrective programs, including a particularly thorny Section 8(e) case.”*

“Derek has done an excellent job with these matters. Mr. Sturtevant utilized his formidable technical and analytical skills to independently reach sound conclusions and make recommendations.”

“Derek works through a problem logically and thoroughly. He keeps abreast of industry trends, as well as FDIC policy and procedures. His knowledge base has proven quite valuable, and Derek serves as a resource to other team members. He has developed particular expertise in dealing with applications. During this evaluation period, Derek reviewed and processed several merger applications on de novo bank application and several management change applications. On a number of occasions during this evaluation period, Mr. Sturtevant was selected to serve as action ARD, or point of contact. For our review team, in the absence of his supervisor Derek I well organized and can be counted on to plan and complete assignments within deadlines. His work products are of uniformly high quality and reflect his strong written communication skills. Mr. Sturtevant freely offers his assistance to others when his workload permits and he has routinely served as back up to other case managers when they were out of the office. Derek is the team’s coordinator for management reporting on sub prime lending and monthly outreach efforts. He has strong oral communications skills and deals effectively with industry representatives”.

“Mr. Sturtevant is a very capable and highly valued case manager and he commands the respect of those with whom he comes in contact. Some of the other activities in which Derek has been involved over the rating period include volunteering to serve on a team conducting field territory audits, assisting with the redesign of the field territory audit work program, volunteering to be an instructor for FDIC schools AESI and IV, performing Vision testing, coordinating the region’s response to the Washington Office regarding the FFIEC call report project, coordinating the teams response to Washington office requests for input regarding the new LIDI program, preparing briefing comments for senior management regarding bankers who would be in attendance at various meetings with FDIC officials, and serving as a contact point for the Orange County field office regarding questions which might arise regarding report processing procedures in connection with the shift of duties to the field offices pursuant to process Redesign”.

An analysis of the contributions of the grievant and employees C & S does not support the Union’s assertion that the grievant’s contribution to the organization was greater than the contributions of employees C and S to the extent that the Arbitrator would justify substituting his judgment for that of the managers. In fact in the Union’s post hearing brief it stated that “In both instances, we outline that while both CSA recipient C and S contributed enough to earn a corporate success awards, neither met the standard to a greater extent than Mr. Sturtevant.” In other words the Union’s view is that it is a close call. Furthermore, a review of the contributions of employees C and S do not reflect, in my opinion, a justifiable gap between the grievant’s contribution and the contributions of

C and S which would justify this Arbitrator to substitute his judgment in place of the judgment of the managers. There was no substantive evidence regarding the value of the contributions of each toward the mission and goals of the region that would contradict the managers' assessment of those contributions.

In summary, I am persuaded by Mr. Foster's ranking as he supervised the grievant for 9 months of the year. He used a consistent methodology and there is no evidence that his judgment was arbitrary, capricious or based on other than the criteria established in the CSA Program. In addition, he recommended that 5 of the 11 bargaining unit employees were potential nominees for a CSA which was reasonable. When the CSA nominations from each unit were reviewed by the ARD and the managers, there is insufficient evidence that the decisions were not fair and equitable. There were reasonable judgments made at the meetings in reviewing each supervisor's recommendations and to insure that an employee was not overlooked who deserved a CSA. The final list was forwarded to the Director for approval.

The Arbitration Awards submitted by both parties were excellent background information and helpful. The Arbitration Awards submitted by the Union although provided valuable background were not on target with the fact/circumstances of this case. Arbitrator Remington's 2 awards dealt with the issue of the Agency not providing comparative information which had an adverse inference on the case. Arbitrator Tranen issued a decision which dealt with a fact circumstance where the grievant was not recommended for an award because his team did not perform well on a project. That case was dissimilar to the current fact situation. Arbitrator Vaughn dealt with an issue of management using inappropriate factors in deciding not to recommend the grievant for a CSA. That factual case is also dissimilar to this case.

Finally the Union has a significant barrier to overcome when challenging the judgment regarding the decisions of ranking employees on their contribution to the organization. The managers have a significant advantage as they are in a position to observe the employees on a daily basis and are able to determine the impact of their contributions to the organization's mission and established goals. In this case based on the evidence, testimony, and post hearing briefs, the Union was not able to overcome that sizable barrier and cannot establish based on the preponderance of evidence that the grievant was not treated in a fair and equitable manner when the Employer did not nominate the grievant for a CSA for his contributions in 2003.

Award

The Employer did not violate the Collective Bargaining Agreement Article 18, Chapter 11 of the FDIC Circular 2420.1, or the FDIC/NTEU Memorandum of Understanding of March 13, 2003 when it failed to nominate the grievant for a Corporate Success Award. The grievance is denied.

Date of the Ruling: December 19, 2005

James G. Merrill, Arbitrator
Livermore Valley, California